

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

TOM WILSON,

Plaintiff,

v.

JO ANNE B. BARNHART, Commissioner of  
Social Security Administration,

Defendant.

CASE NO. **C05-5734FDB**

REPORT AND  
RECOMMENDATION

Noted for January 19, 2006

This matter has been referred to Magistrate Judge J. Kelley Arnold pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Magistrates Rule MJR 4(a)(4) and as authorized by Mathews, secretary of H.E.W. v. Weber, 423 U.S. 261 (1976). This matter has been briefed, and after reviewing the record, the undersigned recommends that the Court affirm the administration's final decision.

INTRODUCTION

Plaintiff, Tom Wilson, was born in 1961, and he attended High School through the 9<sup>th</sup> grade. He has work experience as a small parts assembler, concrete truck driver, and construction worker. He last worked in 1997 as a roofer. He has not worked since December 28, 1997, when he injured his back and neck when a ladder he was standing on collapsed and he fell. He attended Lower Columbia Community College for graphic design following his accident, but he did not complete the program.

Plaintiff filed a claim or application for Title II disability benefits and Supplemental Security Income benefits on January 30, 2003. His claims were initially denied and upon reconsideration. Plaintiff filed a

1 Request for Hearing by Administrative Law Judge (“ALJ”) and the hearing was held on June 23, 2005.  
2 The ALJ issued his decision on July 26, 2005, denying the applications. Plaintiff timely filed a request for  
3 Review of Hearing Decision/Order with the Social Security Appeals Council, but on October 31, 2005, the  
4 Appeals Council ruled against the Plaintiff. The ALJ's decision became the final administrative decision.

5 The ALJ applied the five-step sequential evaluation process for determining whether a  
6 claimant is disabled. *See* 20 C.F.R. § 416.920. At step-one, the ALJ found that Plaintiff had not engaged  
7 in substantial gainful activity (Tr. 16, 24 Finding 2). At step-two, the ALJ found that Plaintiff established  
8 the following severe impairments: degenerative disc disease of the cervical spine with radiculopathy;  
9 degenerative disc disease of the thoracic spine post fusion surgery; and lumbar radiculopathy (Tr. 17, 24  
10 Finding 3). At step three, the ALJ found that Plaintiff's impairments, alone or in combination, did not  
11 satisfy the Listings (Tr. 17, 24 Finding 4). The ALJ determined that Plaintiff retained the following  
12 residual functional capacity (RFC): lift 20 pounds occasionally, 10 pounds frequently; option to sit/stand at  
13 will; no frequent overhead reaching or pushing/pulling with the upper extremities; occasional climb,  
14 balance, stoop, kneel, crouch, and crawl; simple 1 to 3 step tasks, due to possible pain and side effects of  
15 medication (Tr. 23, 25 Finding 6). At step-four, the ALJ found that Plaintiff could still perform his past  
16 work as a light assembler (Tr. 23, 25 Finding 7). In the alternative, at step five, relying upon vocational  
17 expert testimony, the ALJ found that a person with Plaintiff's RFC and vocational profile could perform a  
18 significant number of jobs in the national economy, represented by: assembler (619,000 jobs nationally,  
19 14,500 jobs statewide); electronics worker (450,000 jobs nationally, 10,500 jobs statewide); cashier II  
20 (3,500,000 jobs nationally, 30,000 jobs statewide); and counter clerk (435,000 jobs nationally, 6,000  
21 statewide). The ALJ thus found Plaintiff capable of performing a significant number of jobs in the national  
22 economy and not disabled (Tr. 24, 25-26 Findings 12, 13, and 14).

23 Plaintiff filed a Complaint with the Court challenging the denial of his applications for benefits on  
24 November 11, 2005. Plaintiff specifically argues the ALJ failed to provide clear and convincing reasons to  
25 discredit Plaintiff's subjective pain complaints, and for this reason, the Court should reverse the  
26 administrative decision and award benefits. Defendant contends the ALJ applied the proper legal standards  
27 and that the administrative findings and conclusions were properly supported by substantial evidence.

## 28 DISCUSSION

1 This Court must uphold the determination that plaintiff is not disabled if the ALJ applied the proper  
2 legal standard and there is substantial evidence in the record as a whole to support the decision. Hoffman  
3 v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986). Substantial evidence is such relevant evidence as a  
4 reasonable mind might accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389,  
5 401 (1971); Fife v. Heckler, 767 F.2d 1427, 1429 (9th Cir. 1985). It is more than a scintilla but less than a  
6 preponderance. Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975); Carr v. Sullivan, 772  
7 F. Supp. 522, 525 (E.D. Wash. 1991). If the evidence admits of more than one rational interpretation, the  
8 Court must uphold the Secretary's decision. Allen v. Heckler, 749 F.2d 577, 579 (9th Cir. 1984).

9 Bunnell v. Sullivan, 947 F.2d 341 (9th Cir. 1991) (*en banc*), is controlling Ninth Circuit authority  
10 on evaluating plaintiff's subjective complaints. Bunnell requires the ALJ findings to be properly supported  
11 by the record, and "must be sufficiently specific to allow a reviewing court to conclude the adjudicator  
12 rejected the claimant's testimony on permissible grounds and did not 'arbitrarily discredit a claimant's  
13 testimony regarding pain.'" Id. at 345-46 (quoting Elam v. Railroad Retirement Bd., 921 F.2d 1210, 1215  
14 (11th Cir. 1991)). An ALJ may reject a claimant's subjective complaints, if the claimant is able to perform  
15 household chores and other activities that involve many of the same physical tasks as a particular type of  
16 job. Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989) However, as further explained in Fair v. Bowen,  
17 *supra*, and Smolen v. Chater, 80 F.3d 1273, 1288 (9th Cir. 1996), the Social Security Act does not require  
18 that claimants be utterly incapacitated to be eligible for benefits, and many home activities may not be  
19 easily transferrable to a work environment where it might be impossible to rest periodically.

20 Here, Plaintiff states the ALJ found only two reasons to reject Plaintiff's allegations of pain and  
21 limitations, and Plaintiff argues these two reasons are not clear and convincing. After reviewing the  
22 record, the court is not persuaded by Plaintiff's argument. The ALJ's decision is properly supported by  
23 substantial evidence in the record and the reasons supporting the ALJ's analysis are clear and convincing.

24 The ALJ specifically addressed Plaintiff's credibility in his conclusions, stating, "The claimant's  
25 statements concerning his impairments and their impact on his ability to work are not entirely credible for  
26 the reasons stated in the body of the decision" (Tr. 24). In the body of his decision, the ALJ first  
27 summarized the medical evidence and then addressed Plaintiff's allegations and testimony. The ALJ stated:

28 In reviewing the claimant's allegations and testimony, I find his allegations only partially  
credible. While the claimant's impairments can be expected to result in some pain and

1 limitation in range of motion, they are not of a severity to prevent all work activity. The  
2 opinion of treating and examining physicians are not supportive of the claimant's claims of  
3 total disability. Prior to the claimant's thoracic spine surgery in March 2000 treating  
4 physician Vern W. Harpole, M.D., released the claimant to modified work involving  
5 minimal stooping, twisting, bending; minimal pushing or pulling over 20 pounds; and  
6 minimal repetitive lifting over 20 pounds. (Exhibit 16F/186 and 189). Dr. Harpole reported  
7 in October 2000 that he had been released to work with permanent restrictions of no lifting  
8 repetitively over 25 pounds. (Exhibit 16F/172). In August 2002, Dr. Harpole reported  
9 there was no change in his restrictions and encouraged the claimant to continue with  
10 vocational training in September 2002. (Exhibit 16F/176-177). In addition, Disability  
11 Determination Services medical consultants have opined that the claimant can perform a  
12 modified range of light exertion work activity with postural limitations and limitations in the  
13 use of his upper extremities. (Exhibit 1F and 2F).

14 The medical records do not support the claimant's allegations of disabling pain and reflect  
15 functional ability inconsistent with an inability to perform all work activity. In June 1999,  
16 the claimant reported shoulder pain after helping to rebuild and paint a fence in his yard.  
17 Dr. Harpole reported the claimant was "quite well-muscled with good muscle tone and  
18 posture". He reported there was no pain behavior objectively observed, although he  
19 continued to complain of myriad aches and pains. (Exhibit 16F/163). In July 2000, Dr.  
20 Harpole encouraged the claimant to start thinking about returning to work as he recovered  
21 from spine surgery. (Exhibit 16F/169). In September 2000, the claimant reported he was  
22 "pretty much pain-free at night" but had pain at the surgery site at the end of the day. On  
23 physical examination, he had good range of motion in the cervical and lumbar spine.  
24 (Exhibit 16F/171). In January 2001, the claimant reported that although he wakes up sore,  
25 he is able to perform activities of daily living in addition to performing simple work in his  
26 shop for about three to four hours. Dr. Harpole reported the claimant was "quite functional  
27 now and needs to return to work." (Exhibit 16F/172). In March 2001, the claimant  
28 reported he was maintaining his level of activity with 10 mg OxyContin twice daily, 100 mg  
trazodone at bedtime and Motrin as needed. He reported good days and bad days.  
However, he acknowledged that he was sleeping without difficulty, he "essentially has no  
restrictions in his activity secondary to pain", and was voluntarily limiting his lifting to no  
more than 30 to 40 pounds. (Exhibit 16F/174). The claimant reported in July 2001 that  
although he was nearly bedridden while off medication, his medication allowed him to be  
"quite functional" with "absolutely no impairment". He reported he was looking forward to  
starting vocational training and was able to sleep, perform activities around the house, help  
his wife with ceramics and mow the lawn. He reported he was able sit and work at the  
computer for one to two hours at a time. (Exhibit 16F/174).

The claimant has complained of abdominal pain. However, Dr. Harpole reported that he  
would have to "learn to live with his pain". He also noted that abdominal ultrasound  
performed in August 2002 was "completely normal". (Exhibit 16F/176, 178). Claimant has  
requested by letter of July 19, 2005, that the record be held open for a recent ultrasound.  
That request is denied as the evidence of record suggests the abdominal problems are not a  
severe impairment and are generally controlled with medication.

While Dr. Leininger opined in January 2003 that the claimant had evidence of C7 radicular  
pain possibly due to cervical spondylosis or disc herniation, the September 2004 cervical  
spine MRI revealed no abnormality at that level. (Exhibits 17F/199 and 20F/1267). On  
physical examination performed by Dr. Leininger in April 2003, it was reported that the  
claimant appeared comfortable sitting on the exam table and gait and station were normal.  
The claimant was prescribed pain medication for chronic upper back pain. Dr. Leininger  
recommended increasing his activity and physical therapy. (Exhibit 17F/205). In January  
2005, it was reported that the claimant's functional ability was minimal. However, it was  
reported that although the claimant complained of chronic left-sided trunk pain radiating  
into his left arm, his MRI reflected nothing "to explain his left upper limb symptoms well."

1 It was opined that his pain was under treated.. (Exhibit 19F/258). Medical records dated  
2 February 14, 2005, reveal the claimant reported an ability to walk for one hour and perform  
3 such activities as clearing brush from his property. (Exhibit 19F/261). Medical records  
4 dated March 16, 2005, reveal the claimant stays active working on rental property, although  
5 he reported that using a push mower results in neck pain and severe headaches. However,  
6 he reported his belief that he was capable of using a sitting lawn mower without these  
7 problems. Although the claimant reported pain at 8/10, he had not received his prescription  
8 of OxyContin. (Exhibit 19F/263). On both dates, the claimant was described as alert,  
9 oriented, in no acute distress, not sedated, somnolent, or ataxic and walking without  
10 difficulty. At the hearing, the claimant acknowledged performing some work activity in  
11 March 2005 such as mowing the lawn and ensuring that tenants pay rent.

12 The record also contains evidence that the claimant is over-focused on pain and has  
13 exaggerated his pain complaints. The records reveals that he was admitted for pain center  
14 treatment for two weeks in December 1998. However, he stated that he intended to  
15 participate in no physical activity because he expected that it would result in increased pain.  
16 At discharge it was reported that the claimant "had participated so minimally in physical  
17 therapy activities that no significant changes were made." (Exhibit 6F/29). The claimant  
18 exhibited positive Waddell's signs during examination in December 1998, suggesting a  
19 non-organic source of his complaints of pain. While it was not concluded that the claimant  
20 was malingering, it was determined that there was a psychological component to his pain  
21 complaints. (Exhibit 5F/25-26). After an independent medical examination performed in  
22 February 1999, it was opined that the claimant demonstrated "significant pain  
23 magnification" based on all Waddell's signs being positive. (Exhibit 8F/3 8). At that time it  
24 was also noted by another physician that when the claimant was distracted, he was less  
25 limited. (Exhibit 7F/32). In January 2001, Dr. Harpole reported, "[A]s I predict, this  
26 patient is going to be extremely difficulty [sic] to get back to work with his somatizing  
27 personality and anxiety. I am afraid we are going to be fraught with lots of pain problems".  
28 (Exhibit 16F/173). The above suggests that the claimant's complaints of pain cannot be taken  
at face value, and, the psychological testing does not support a pain disorder.

1 In addition, his efforts at vocational rehabilitation suggest he considered himself capable of  
2 performing some types of work activity. He testified he attended community college in a  
3 graphic design program with vocational retraining funding for one and one-half years. He  
4 stated he took math and graphic design courses and used a computer design program. He  
5 stated his cumulative grade point average was 3.25. While he testified that he did not  
6 complete that training because of lack of funding, information contained in medical records  
7 suggest that other factors are at play. He told his doctor in April 2003 that "[h]e did a  
8 vocational retraining program but never finished his math class so therefore cannot get a job  
9 and cannot afford to finish his schooling". (Exhibit 17F/206).

10 The claimant reported engaging in activities such as playing guitar one to three times per  
11 day for one-half hour at a time, attending church two to three times per week, visiting  
12 friends one to three times per week for one to four hours at a time, reading three to four  
13 hours per day, accompanying his wife to shop for groceries, mowing the lawn, and driving  
14 for periods of up to one-half hour. (Exhibits 2E/7-8, 6E, 12E). The ability to perform such  
15 activities is inconsistent with an inability to perform any type of work activity.

16 The claimant's credibility is further reduced by inconsistencies in his statements. He claims  
17 to have worked consistently since his teenage years. He testified at the hearing that all his  
18 income was reported and he worked as a self-employed roofer at one time. However,  
19 perusal of his earnings record reveals he has at best a modest earnings history. He reported  
20 self-employment earnings of only \$1,245 through Wilson's Roofing Company in 1984.  
21 (Exhibit 5D/17). In his last 12 years of work he earned over \$10,000 in only four years. He  
22 earned well under \$10,000 in the remainder of the 12 years and no earnings were reported  
23 in 1992. (Exhibit 4D). He later acknowledged that he was unemployed much of the time.



1 The claimant has not worked since his work injury in 1997, apparently living off his  
2 workers' compensation settlement. He has since attempted to obtain additional workers'  
3 compensation for his cervical spine problems. However, in September 2002 treating  
4 physician Vern Harpole, M.D., opined that the claimant's neck problems were related to  
5 pre-existing arthritis and not to any work injury. Dr. Harpole reported, "[P]atient was  
6 extremely unhappy with my opinion and is going to get a lawyer and fight this and get the  
7 cervical spine problem to be allowed." (Exhibit 16F/177). Although workers' compensation  
8 covered some vocational re-training in graphic design, he did not complete that training.  
9 The above and the evidence of record as a whole suggest that the claimant has  
10 demonstrated little motivation to work. I note that he testified he owes \$16,000 in Child  
11 support payments. Moreover, he clearly has an interest in obtaining Social Security  
12 disability benefits since they would exceed what he has earned most of his adult life.

13 Given all the above, I find the claimant's allegations of disabling pain and other limitations  
14 are excessive and not fully credible.

15 In assessing the claimant's credibility, I have considered and given little weight to the  
16 January 28, 2004, statement of social worker Robyn Green. (Exhibit 9E). I find her  
17 statement to be generally credible to the extent she reports her observations of the behaviors  
18 the claimant demonstrates. However, the information provided by witnesses is considered  
19 in conjunction with the objective medical record, findings, assessments, etc. There is no  
20 indication that Ms. Green saw the claimant on more than one occasion. Her observation that  
21 the claimant was uncomfortable sitting and limped is inconsistent with medical records  
22 which reflect that the claimant sits comfortably on the exam table and demonstrates normal  
23 gait and station. (Exhibits 17F/205 and 19F/261, 263). Because there is no indication that  
24 Ms. Green has been trained as a medical professional, her opinions that the claimant  
25 exhibited "pain behavior that was not exaggerated" and seemed to be "severely limited  
26 physically" are out of the range of her expertise as a social worker. While it is accepted that  
27 observations of Ms. Green, such as her report that the claimant did not move his arm much,  
28 reflect a diminished capacity they are not conclusive of disability.

I have further considered material provided after the hearing consisting of medical records  
from Peace Health Medical Center from February-June 2005. These records report a  
continuation of the basic complaints present in the earlier records with some better control  
of symptoms as medications are changed. He continues to complain of pain at a high level,  
however, his presentation and exam are relatively benign.

Based on all the evidence of record and extending as much credibility to the claimant as  
possible, I find the claimant retains the residual functional capacity to lift and/or carry up to  
10 pounds frequently and up to 20 pounds occasionally. He must have the option to sit or  
stand at will. He is limited to work which requires no frequent overhead reaching or  
pushing/pulling with the upper extremities. He can occasionally climb, balance, stoop, kneel,  
crouch, and crawl. In addition, because of possible pain and side effects of medication, he is  
limited to work involving simple, one- to three-step tasks.

(Tr. 19-23). The court notes the ALJ's lengthy and detailed explanation contains several legitimate  
reasons to discredit Plaintiff's pain complaints. After reviewing the ALJ's decision and the administrative  
record, it is clear the ALJ has provided legally sufficient evidence to discredit the Plaintiff's allegations of  
total disability. Accordingly, the ALJ properly discredited plaintiff's testimony and allegations suggesting  
total disability.

CONCLUSION

Based on the foregoing discussion, the Court should affirm the Administration's final decision denying plaintiff's application for social security disability benefits. Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed.R.Civ.P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on **January 19, 2007**, as noted in the caption.

DATED this 26th day of December, 2006.

/s/ J. Kelley Arnold  
J. Kelley Arnold  
U.S. Magistrate Judge